No. 85-1804

In The Supreme Court of the United States
October Term, 1985

THOMAS WEST,

Petitioner,

v.

CONRAIL, a foreign corporation;
BROTHERHOOD OF
MAINTENANCE OF WAY EMPLOYEES:
LOCAL 2906, a foreign corporation;
NEW JERSEY TRANSIT, a corporation of
the State of New Jersey;
and ANTHONY VINCENT,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED*

Are actions involving the federal duty of fair representation sufficiently unique to warrant creating an exception to the general rule that in federal question cases the filing of a complaint, not completion of service, satisfies the statute of limitations?

* All parties to the proceeding in the courts below are identified in the caption.

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As a general rule, the statute of limitations in a federal question case is satisfied by filing a complaint with the clerk of the district court within the relevant time period. The court below created an exception to this rule for complaints involving the duty of fair representation, on the theory that this Court's decision in *DelCostello v. Teamsters*, 462 U.S. 151 (1983), required that such complaints be served on the defendants, as well as filed in court, within the six-month limitations period. Because the adoption of the rule requiring service within six months would undermine a vital "bulwark to prevent arbitrary union conduct," *Vaca v. Sipes*, 386 U.S. 171, 182 (1967), the decision below should be reversed.

OPINIONS BELOW

The decision of the district court is not reported, and is set forth at pages 14a to 17a of the appendix to the petition for a writ of certiorari. ("Pet. App. 14a-17a"). The court of appeals' opinion is reported at 780 F.2d 361 and is reprinted at Pet. App. 1a-13a.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 1985. App. 18a. On March 27, 1986, Justice Brennan extended the time for filing a petition for a writ of certiorari until May 5, 1986. The Court granted certiorari on June 30, 1986. 106 S. Ct. 3293. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED

Rule 3 of the Federal Rules of Civil Procedure provides:

> A civil action is commenced by filing a complaint with the court.

Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), provides as follows, with the most relevant portions italicized:

> (b) *Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board*, or any agent or agency designated by the Board for such purposes, *shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect*, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made*, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

STATEMENT

Petitioner Thomas West was employed in New Jersey as a mechanic by respondent Consolidated Rail Corporation ("Conrail"), and was represented in collective bargaining by respondent Local 2906 of the Brotherhood of Maintenance of Way Employees ("Union"). In November, 1981, as petitioner was leaving a company truck in which he had been riding in the back seat, four bottles of beer were found on the front seat. Petitioner was fired despite his spotless record and his assertion that he was unaware that there had been any beer in the truck.

Over the next 28 months, petitioner was repeatedly assured by respondent Anthony Vincent, his Union representative, that although the appeal of his termination had been delayed, it was being pursued, and that the Union would obtain both reinstatement and back pay for him. During this time, petitioner accepted an offer of reinstatement from Conrail, but the backpay issue remained unresolved. On March 25, 1984, petitioner first became aware that his Union representative was not pursuing the question of backpay, and that there was little, if any, chance that any further action would be taken.

On September 24, 1984, petitioner filed a complaint in the United States District Court for the District of New Jersey alleging that respondent Conrail had discharged him in violation of the collective bargaining agreement, and that respondents Union and Vincent had breached their duty of fair representation by their failure to pursue his grievance. Respondent New Jersey Transit was sued as the successor in interest to Conrail. The summonses and complaints were mailed to respondents on October 10, 1984, pursuant to Rule 4(c)(2)(C) of the Federal Rules of Civil Procedure, and respondents acknowledged service on dates ranging from October 12, 1984, through November 1, 1984. For present purposes, it is undisputed that the complaint was filed before the statute of limitations had expired, but that service was not completed until after the statute had run. Pet. App. 3a, 17a.

Relying on this Court's decision in *DelCostello v. Teamsters*, 462 U.S. 151 (1983), respondents moved for summary judgment on the ground that the action was barred by the six-month statute of limitations, borrowed by this Court from section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b). Respondents argued, and the district court agreed, that because section 10(b) requires unfair labor practice charges to be both served on the respondents and filed with the National Labor Relations Board within six months, a "hybrid action" such as this, brought both to enforce the union's duty of fair representation and the employer's obligation under the contract, must also be served on all defendants, as well as filed with the district court, within that limitation period. App. 17a.

A divided panel of the Court of Appeals for the Third Circuit affirmed. The majority, consisting of Judges Stapleton and Adams, acknowledged that the general rule for federal question lawsuits is that the action is commenced, and the statute of limitations tolled, by filing the complaint. Pet. App. 4a. They observed, however, that at the time of their decision most courts that had addressed the question in fair representation cases had nonetheless required service as well as filing within six months. *Id.* at 4a-5a. It concluded that this Court's decision in *DelCostello* was based on a balance of interests struck by Congress in section 10(b), and that balance required both filing and service within six months. *Id.* at 5a-6a.

Judge Gibbons dissented. In his view, neither the district court, nor any of the decisions on which the majority relied, had analyzed the question, but had merely assumed that this Court intended in *DelCostello* to require adoption of all of section 10(b), not just its limitations period. Pet. App. 9a. He declined to follow that approach for several reasons. First, he noted that section 10(b) only requires service of a simple "charge" filed by the injured party within six months, although a substantial amount of time may pass before the respondent learns that the agency has decided that there is reason to believe that the statute was violated and thus to file a "complaint" against the respondent. *Id.* at 10a. Moreover, the notice functions performed under the NLRA by section 10(b)'s service requirement are met in federal court by Rules 4(a) and 4(j) of the Federal Rules of Civil Procedure, which assure prompt service. *Id.* at 10a-11a. Thus, although it was necessary to turn to section 10(b) to "borrow" a statute of limitations to fill a gap in federal law, Judge Gibbons concluded that there is no gap in federal law—and thus no need to borrow any rules—regarding the end of the running of the statutory period. *Id.* at 12a. Finally, Judge Gibbons observed that by adhering to the requirements of the Federal Rules, and not adopting the rest of section 10(b), the courts would maintain a uniform federal procedure and decrease uncertainty by establishing an easily ascertainable point to measure the ending of the limitation period. *Id.* at 11a-12a.

Because of the need to provide a uniform answer to this question, on which the circuits are now evenly divided, the Court granted certiorari. 106 S. Ct. 3293.[1]

SUMMARY OF ARGUMENT

The normal rule in federal question cases is that the statute of limitations is satisfied by filing a complaint within the required time, and service within that time is not required. The court below believed, however, that this case should be treated differently because in *DelCostello* this Court decided that duty of fair representation ("DFR") cases are governed by section 10(b) of the NLRA, and that section requires service as well as filing within six months.

The source of the court's error is three-fold—it overstates the effect of *DelCostello*, overlooks important interests recognized in *DelCostello* that would not be advanced by its rule, and understates the damage which the rule it proposes would wreak on the interests which the *DelCostello* rule was intended to serve. Thus, in DelCostello the Court did not decide that every detail of the administrative procedure set forth in section 10(b) would henceforth be applied to DFR actions in the district courts; rather, it only decided that the available state statutes of limitations would so disserve the various interests at stake in DFR cases that it was appropriate to borrow the federal limitation period adopted by Congress for filing unfair labor practice charges. Moreover, there is no need to adopt a special rule requiring prompt service of DFR complaints because the Federal Rules already provide for dismissal of actions unless service has been obtained within 120 days after filing of the complaint.

[1] The Ninth and Eleventh Circuits agree with the Third Circuit. *Gallon v. Levin Metals Corp.*, 779 F.2d 1439 (9th Cir. 1986), *cert. pending*, No. 85-1835; *Howard v. Lockheed-Georgia Co.*, 742 F.2d 612 (11th Cir. 1984). The Second, Sixth and Eighth Circuits disagree. *Ellenbogen v. Rider Maint. Corp.*, 794 F.2d 768 (2d Cir. 1986); *Macon v. ITT Continental Baking Co.*, 779 F.2d 1166 (6th Cir. 1985), *cert. pending*, No. 85-1400; *Thomsen v. UPS*, 792 F.2d 115 (8th Cir. 1986), *cert. pending sub nom. Local 710, International Brotherhood of Teamsters v. Thomsen*, No. 86-340. *Accord, Berthelot v. Martin Marietta Corp.*, 630 F. Supp. 929 (E.D. La. 1986).

Finally, the differences between the service of an administrative charge at the NLRB and the procedures for serving a complaint in district court are such that adoption of the service rule proposed by the union would substantially cut into the six-month period within which DFR actions must be brought. Thus, because there is no basis for carving out an exception to the general rule that limitation periods in federal question cases are satisfied by filing the complaint, the decision below should be reversed.

ARGUMENT

THE *DELCOSTELLO* DECISION DOES NOT WARRANT A DEPARTURE FROM THE NORMAL FEDERAL RULE THAT THE STATUTE OF LIMITATIONS IS SATISFIED BY FILING A COMPLAINT IN THE DISTRICT COURT.

A. The Normal Federal Rule.

As the court below recognized, Pet. App. 4a, and as at least some of the respondents conceded, if this were a suit under any other federal statute, there would have been no question that the statute of limitations was satisfied by filing the complaint in district court, notwithstanding petitioner's failure to complete service on all four defendants for several weeks following expiration of the limitations period. Thus, outside the fair representation area, every court of appeals which has considered the question has decided that Rule 3 of the Federal Rules, under which "[a] civil action is commenced by filing a complaint with the court," determines what steps are necessary to satisfy the statute of limitations when litigating a federal claim in federal court, absent an express federal statute providing otherwise. *Bomar v. Keyes*, 162 F.2d 136, 140-141 (2d Cir. 1947); *Moore Co. v. Sid Richardson Carb. & Gas Co.*, 347 F.2d 921, 924 (8th Cir. 1965); *United States v. Wahl*, 583 F.2d 285, 287-288 (6th Cir. 1978); *Caldwell v. Martin Marietta Corp.*, 632 F.2d 1184,

1188 (5th Cir. 1980); *Jordan v. United States*, 694 F.2d 833, 837 n.7 (D.C. Cir. 1982); *Metropolitan Paving Co. v. Operating Engineers*, 439 F.2d 300, 306 (10th Cir. 1971). *See also* 2 *Moore's Federal Practice* ¶ 3.07[4.-3-2], at 3-113 to 3-126 (1986); 4 Wright & Miller, *Federal Practice & Procedure: Civil* § 1056, at 177-178 (1969). *Accord, Poetz v. Mix*, 7 N.J. 436, 440, 81 A.2d 741 (1951) (same rule under law of New Jersey, where case arose and was filed).

This Court has never squarely decided that Rule 3 has this significance, but its decisions strongly point in that direction. Thus, in *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949), the Court held that Rule 3 would not supersede a contrary state statute in a diversity case, but it distinguished the Second Circuit's decision in *Bomar v. Keyes, supra*, apparently agreeing with the Second Circuit that Rule 3 determines what is required to satisfy the statute of limitations in suits to enforce federal rights. 337 U.S. at 533. *See* Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 729 (1974). This reading of the *Ragan* dictum was confirmed in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), where the Court reaffirmed the holding of *Ragan*. In doing so, the Court observed that *Ragan* "suggested . . . that in suits to enforce rights under a federal statute Rule 3 means that filing of the complaint tolls the applicable statute of limitations," but it declined to decide the question. 446 U.S. at 751 n.11. Since *Walker* was decided, the courts have remained virtually unanimous—at least in non-DFR suits—that Rule 3 governs that satisfaction of the statute of limitations in federal question cases.[2]

[2] *E.g., Cohn v. Board of Education*, 536 F. Supp. 486, 493-495 (S.D.N.Y. 1982); *Wells v. Portland*, 102 F.R.D. 796, 799-800 (D. Ore. 1984); *Perkin Elmer v. Trans Med. Airways*, 107 F.R.D. 55 (E.D.N.Y 1985); *Gutierrez v. Vergari*, 499 F. Supp. 1040, 1049 n.7 (S.D.N.Y. 1980); *Hobson v. Wilson*, 737 F.2d 1, 44-45 (D.C. Cir. 1984). Even the courts holding that fair representation complaints must be served as well as filed within the six-month limitations period have generally recognized that they are departing from the general rule. *E.g.*, Pet. App. 4a; *Howard v. Lockheed-Georgia Co.*, 742 F.2d 612, 613 (11th Cir. 1984). An exception is *Ellenbogen v. Rider Maint. Corp.*, 621 F. Supp. 324, 326 (S.D.N.Y. 1985), *rev'd*, 794 F.2d 768 (2d Cir. 1986), although the same District Judge intimated a different view of Rule 3 elsewhere. *Buccino v. Continental Assur. Co.*, 578 F. Supp. 1518, 1523 n.3 (S.D.N.Y. 1983).

This Court took the same view of Rule 3 in *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984), where the question was whether a plaintiff had satisfied the ninety-day statute of limitations which is expressly provided for in Title VII cases. Without adverting to either *Walker* or *Ragan*, the Court answered that question by looking to see whether, within the ninety-day period, the plaintiff had complied with Rule 3 by filing a "complaint" with the court. 466 U.S. at 149. Because the Court concluded that the document filed within the limitations period did not constitute a complaint under the Federal Rules, the Court held that the statute of limitations had not been satisfied and that the action had to be dismissed.

The court below concluded, however, that this case is not controlled by the general rule because section 10(b) requires both filing and service in order to commence an action. In so ruling, the court did little more than cite the approach taken by several other courts which can be summarized as follows: the service requirement is contained in section 10(b) because Congress thought it necessary for unfair labor practice charges, and "[t]here is no reason why the six-month period would be borrowed and the filing and service would be left to the general rule." *Howard v. Lockheed-Georgia, supra*, 742 F.2d at 614.[3]

The short answer to this argument is that even when courts borrow state limitations periods for federal question cases, they apply the general rule that filing the complaint in federal court tolls the statute. *E.g., Jackson v. Duke*, 259 F.2d 3, 6 (5th Cir. 1958). Of course, had Congress specified that, notwithstanding the general rule set forth in Rule 3, a suit to enforce a particular right is not timely unless certain prerequisites in addition to filing are met, that would decide the issue. But section 10(b) con-

[3] Section 10(b) also permits respondents to be required to file an answer and appear at a hearing as little as five days after the unfair labor practice complaint is filed, permits the complaint to be amended not only during but even after trial, provides a standard for intervention, and requires application of the federal rules of evidence only "so far as practicable." Yet nobody has argued that *DelCostello* also requires that these provisions should displace Federal Rules 12, 15 and 24, and excuse compliance with the Federal Rules of Evidence, in DFR litigation.

tains no Congressional judgment about DFR litigation. In order to understand why the court of appeals erred in concluding that the service requirement should nonetheless be imposed on DFR plaintiffs, we first review briefly in Section B the genesis both of the DFR and of the *DelCostello* decision that was designed, not to frustrate, but to channel the resolution of DFR claims. *See generally Frandsen v. BRAC*, 782 F.2d 674 (7th Cir. 1986). Thereafter, in Sections C and D, we demonstrate that the ruling below produces results inconsistent with that history and would frustrate the enforcement of DFR claims.[4]

B. The History of the DFR Claim and of the Relevant Statute of Limitations.

Although nowhere expressly set forth in any labor statute, the DFR is a necessary product of the fact that a free society, which places a high value on the rights of the individual, nevertheless makes collective bargaining the central element of its national labor policy. Federal law gives a majority of employees in an appropriate bargaining unit the right not only to choose a representative for purposes of collective bargaining, but also to impose their choice on all other employees in the unit, depriving the minority of the right to bargain for themselves. NLRA § 9, 29 U.S.C. § 159. *See Emporium-Capwell Co. v. Western Add'n Cmnty. Org.*, 420 U.S. 50 (1975). This exclusive representative (the union) has the right to abrogate any bargains that might be struck by individual employees. *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944). Moreover, once an agreement has been reached, the

[4] The fact that the service requirement is a departure from the normal federal rule places a burden of justification on its proponents. In our view, however, even if respondents do not bear the burden of justification, the balance of the policy interests at stake clearly requires that filing be deemed sufficient to satisfy the statute of limitations. Accordingly, the Court could reverse the decision below without deciding the question postponed in *Walker v. Armco Steel Corp., supra*, if it believes that the "normal federal rule" is in doubt and prefers to wait for a case in which its resolution is essential to the result.

union has the exclusive authority to decide in each case whether to use the enforcement mechanisms created by it—normally a grievance and arbitration system—to seek redress for violations of the contractual rights of individual members. *See Vaca v. Sipes*, 386 U.S. 171, 190-191 (1967).

In a free society, such authority carries with it a fiduciary responsibility to the individuals whose bargaining rights are thus extinguished. Indeed, as the Court recognized in *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 198-199 (1944), grave constitutional questions would arise unless the union also had a duty to exercise these statutory powers in a manner fair to all employees. Although *Steele* arose under the Railway Labor Act, the Court found a similar duty to represent employees "fairly and impartially" under the NLRA. *Wallace Corp. v. NLRB*, 323 U.S. 248, 255 (1944); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953). And, because the collective representative also controls the individual's access to the grievance system, the Court has ruled that the DFR extends to a union's exercise of its grievance handling authority as well as to the power to negotiate contracts which was involved in earlier cases. *Vaca v. Sipes*, 386 U.S. 171 (1967); *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976).

The Court first confronted the question of statutes of limitations for DFR cases in *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981). Because the question on which certiorari had been granted was narrow, the Court was restricted in *Mitchell* to deciding which state statute of limitations was most closely analogous to Mitchell's suit against his employer over a discharge that had been upheld by a joint labor-management committee. Given that choice, the Court decided that the state limitation period for seeking to vacate an arbitration award not only was the most closely analogous, but also was the most appropriate because the alternatives—tort, contract, or rights created by statute—often allowed plaintiffs to wait as long as six years before filing suit.

Then, two years later in *DelCostello*, the Court was asked to choose between borrowing a state limitation period and borrow-

ing a federal one. The Court began by recognizing that when federal courts are required to choose a limitation period for a particular federal right for which Congress has not prescribed a specific period, they normally borrow state statutes rather than federal ones. 462 U.S. at 158-160. However, the Court also recognized that state limitation periods should not be applied when doing so would frustrate the relevant federal policies. *Id.* at 160-161. The Court decided to apply this exception to DFR actions, both because the analogy between the federal and the state claims was somewhat tenuous and, more important, because the application of the most closely analogous state limitation period posed a serious obstacle to the enforceability of the DFR, inasmuch as most states allow only ninety days to sue to vacate arbitration awards.

The Court noted that a DFR suit is brought, not by a commercial enterprise or other institution which has regular dealings with attorneys, but by an unsophisticated employee who "is called upon, within the limitations period, to evaluate the adequacy of the union's representation, to retain counsel, to investigate substantial matters that were not at issue in the arbitration proceeding, and to frame his suit." *Id.* at 167. Although it had decided in *Mitchell* that a state arbitration statute was preferable to allowing DFR suits to be filed six years after the violation, it did not follow that ninety days was enough time for a worker to bring a DFR action. Thus, the Court rejected state arbitral limitation periods because they "fail to provide an aggrieved employee with a satisfactory opportunity to vindicate his rights under § 301 and the fair representation doctrine." *Id.*

Buttressing the Court's willingness to reject the state limitation periods was the availability of a federal limitation period designed to accommodate a similar range of interests. *Id.* at 169. Thus, Congress had decided that six months was the proper amount of time for "making charges of unfair labor practices to the NLRB," 462 U.S. at 169, and the DFR not only is inferred from the NLRA, but also raises issues similar to some of the claims which are commonly advanced under sections 8(b)(1)

and 8(b)(2) of the NLRA. Accordingly, without deciding that six months was an ideal limitation period, the Court ruled that it was the most closely analogous period and should be applied to DFR suits.

The Court specifically denied that its holding was based upon Congressional intent to apply section 10(b) to hybrid cases. To the contrary, it said, the only reason that it had to look for an applicable statute of limitations was that Congress had not intended *any* particular statute of limitations to apply in such cases, and the Court had to identify "the most suitable source for borrowing *to fill a gap in federal law.*" 462 U.S. at 169 n.21 (emphasis added). Accordingly, under the reasoning of *DelCostello*, respondents cannot justify turning to section 10(b) to borrow its service requirements unless they can identify "a gap in federal law" that needs to be filled. But no such borrowing is needed because Federal Rule 3 supplies the rule to govern this case. As the Second Circuit observed in *Ellenbogen v. Rider Maint. Corp.*, 794 F.2d 768, 769 (1986), "In this context Polonius' admonition: 'neither a borrower, nor a lender be,' for 'borrowing dulls the edge of husbandry' is sound advice."

In order to justify an exception to the normal rule in federal question cases, respondents must make a showing comparable to that in *DelCostello: i.e.*, that the general rule would so frustrate the policies served by the DFR and its statute of limitations that it is necessary to apply a different rule, *and* that the application of the service requirement of section 10(b) would not frustrate the relevant federal policies underlying DFR actions. The court of appeals paid no attention whatsoever to these considerations, and as we now show, the exception cannot be justified on either ground.[5]

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[5] Unlike *DelCostello*, the DFR in this case is based on the Railway Labor Act ("RLA"), not the NLRA. Although the RLA has a two-year statute of limitations for suits to overturn an arbitration decision, 45 U.S.C. § 153, First (r), every court of appeals to consider the issue has concluded that the NLRA's six-month limitations period should also be borrowed for DFR actions in industries subject to the RLA. *E.g., Dozier v. TWA*, 760 F.2d 849, 851 (7th Cir. 1985). This action was litigated in the lower courts on that assumption, and we do not argue in this Court that the six-month limitation period does not apply to this case.

C. Application of the General Rule That Filing the Complaint Satisfies the Statute of Limitations Would Not Frustrate the Policies Underlying Either the DFR Doctrine or the *DelCostello* Decision.

One key reason given by the *DelCostello* Court for choosing the six-month limitation period was to stabilize labor relations by allowing the parties to a collective bargaining agreement to be certain after a modest amount of time that the dispute is over. 462 U.S. at 168-169. Some unions have argued that, under Rule 3, the parties will be put in limbo for substantial periods beyond six months, or may not realize that they must face litigation until after records have been destroyed and witnesses have either departed the scene or forgotten the events in question. As we now explain, this argument is vastly overstated.

Although there once may have been some danger of such lingering uncertainties, when an action could survive even if service were not achieved for as long as three years, *Moore Co. v. Sid Richardson Carb. & Gas. Co.*, 347 F.2d 921 (8th Cir. 1965), that possibility was removed by the 1983 amendments to the Federal Rules of Civil Procedure. Under Rule 4(j), absent a showing of good cause, a complaint must be dismissed unless service has been obtained within 120 days. Thus, although a union or employer may be sued without having received notice within the six month period, it can be sure of having received such notice shortly thereafter. Moreover, if a union or employer wished to discard records pertaining to a particular grievance, it could call the district court immediately after the six months has run to learn whether a complaint has been filed against it. Finally, even if a plaintiff sought an extension of time to complete service, the courts would consider the policies behind the six-month limitation period, including whether defendants had any notice of the suit and were prejudiced by the delay, as well as whether the plaintiff had diligently sought to effect service. Accordingly, the policies advanced by section 10(b)'s requirement that service be made within six months are substantially satisfied in federal court litigation by the prompt service requirement of Rule 4(j). Therefore, it is unnecessary to borrow the service rule in section 10(b) to replace the general rule in order to ensure the expeditious resolution of labor disputes.

Indeed, this case nicely illustrates the hollowness of the claim that Rule 3 spreads a cloud of uncertainty over the affairs of employers and unions alike. The complaint was filed on September 24, 1984, the summonses and complaints were mailed on October 10, 1984, and respondents acknowledged service on dates between October 12 through November 1. In contrast to these respondents who received notice of this action in less than a month after it was filed, petitioner's grievance was allowed to lie fallow for over 28 months before he found out that it was being abandoned. If speedy resolution of labor disputes is what unions and employers want, they have it fully in their power to provide a prompt decision, which will start the six-month period running. Moreover, the employee, who is generally both out of a job and low on funds, has no interest in delay inasmuch as he or she can only obtain relief after defendants are served and the lawsuit is won.

Furthermore, even section 10(b) does not require that the union and company receive notice of the employee's allegations within the six month period because, under NLRB regulations, service is effective upon mailing of the unfair labor practice charge. 29 C.F.R. § 102.113(a).[6] This regulation has been specifically upheld as a proper construction of section 10(b) because it avoids the uncertainties that would otherwise be produced by the "vicissitudes and uncertainties" of requiring actual receipt within six months. *NLRB v. Laborers Local 264*, 529 F.2d 778, 781-785 (8th Cir. 1976). Indeed, as the dissenting judge below noted, even after the charge has been received, the person named in the charge still does not know whether the Board's General Counsel will actually initiate proceedings against it, and there is no time limit within which the General Counsel must decide whether or not to do so. Pet. App. 10a. Ob-

[6] The Board's regulations on service, 29 C.F.R. §§ 102.14 and 102.111-.113, and the standard NLRB charge form, are included in the addendum to this brief at 1a-4a.

viously, if the NLRB may adjudicate unfair labor practice charges despite the fact that the respondent has not received actual notice that proceedings will be initiated against it until long after six months have passed, there is no reason why the power of district courts to hear DFR claims should be more limited.

Thus, it is clear that application of the general rule that the statute of limitations is satisfied by filing the complaint would not frustrate the policies underlying *DelCostello* or section 10(b). However, application of the rule for which respondents argue would frustrate those policies in a variety of ways, as we now demonstrate.

D. A Requirement That Service of a DFR Complaint Be Effected Within Six Months Would Frustrate the Policies Underlying *DelCostello* and Would Endanger the Enforcement of the DFR.

An unspoken assumption underlying the ruling below is that service of a complaint in federal court is a simple matter and that requiring it to be completed within six months will not cut substantially into the period provided in section 10(b). Aside from the fact that many DFR complaints are filed *pro se, e.g., Ellenbogen v. Rider Maint. Corp.*, 794 F.2d 768, 772 (2d Cir. 1986); *Thomsen v. UPS*, 792 F.2d 115, 116 n.2 (8th Cir. 1986), initiating litigation and obtaining service in these cases is by no means a routine exercise that can be quickly and certainly accomplished, even by an experienced practitioner. The fundamental flaw in the decision of the court below is that it attempts to engraft a service rule designed by Congress for the use of individual workers to initiate an administrative investigation of alleged wrongdoing onto federal court proceedings which make far greater demands on workers and their lawyers in order to initiate litigation.

As this Court recognized in *DelCostello*, once the employee's grievance is finally denied, the prospective DFR plaintiff, who normally has little legal sophistication and no contact with lawyers, must decide that his or her legal rights have been violated, find a lawyer and produce enough money to finance

litigation, and prepare and initiate a lawsuit. 462 U.S. at 165-166. Moreover, although most defense counsel in DFR litigation are highly experienced labor lawyers, such lawyers are usually unwilling to represent DFR plaintiffs, and the lawyers who are willing to take DFR cases often have little or no prior knowledge of what is required in a DFR suit. Goldberg, *The Duty of Fair Representation: What the Courts Do in Fact*, 34 Buff. L. Rev. 89, 143-144 and n.198 (1985).

Initially, the plaintiff's attorney must conduct a reasonable inquiry into the merits, Rule 11, F. R. Civ. P., and then prepare a complaint which, although it need only be a "short and plain statement of the claim," Rule 8, F. R. Civ. P., must nevertheless contain specific averments of various kinds. The Board, by contrast, provides a simple, one-page, preprinted form that provides space for including information about the charging party and the accused, and elicits a simple statement, usually a single sentence or brief paragraph, describing the alleged violation. *See* Addendum, 4a. The specifics are then ascertained by the General Counsel's investigation, which culminates in a complaint that provides sufficient detail about the unfair labor practice to permit the respondent to prepare a defense if, in fact, the General Counsel believes that a violation was committed. As the Court said in *NLRB v. Fant Milling Co.*, 360 U.S. 301, 307 (1959), "A charge filed with the Labor Board is not to be measured by the standards applicable to a pleading in a private lawsuit." [7]

Once the complaint has been drafted, the plaintiff must then prepare summonses, have the district court clerk emboss them with the court's seal, and decide how to serve them. The proper means of service depends on the type of defendant to be served, Rule 4(d), as well as whether the defendant is located in the

[7] However, in order to be faithful to the principle advanced by the court below, so that the balance struck by Congress in section 10(b) would determine everything that a DFR plaintiff must do within the six-month limitations period, the courts would be required to disregard Rule 8 of the Federal Rules of Civil Procedure and hold that service of an administrative form is sufficient to initiate a DFR suit. *But see Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984).

forum state or elsewhere. Rule 4(e). And, if the defendant is located outside the forum state, the plaintiff must decide which state service rules are applicable. In some circumstances, the plaintiff may be able to use the special acknowledgement form provided by Rule 4(c), although in many circumstances that kind of service may not be effective. Although assistant clerks of many courts are helpful in this regard, particularly for a plaintiff proceeding *pro se*, they will not necessarily be able to provide the correct answer in every situation and almost certainly will not be sufficiently familiar with the special requirement under section 10(b) to warn the plaintiff that service must be completed within the six-month statute of limitations period, rather than within 120 days after filing as provided in Rule 4(j).

Assuming that the plaintiff has mastered the different service procedures in the judicial forum, he or she must then proceed to use the correct method or methods. But, under the decision of the court below, he or she also must be sure to file the complaint well before the expiration of the six-month limitation period, because service of a complaint pursuant to Rule 4 is effective only upon receipt by the defendant.[8] Thus, if the plaintiff has chosen an incorrect means of service for the particular defendant, or if the process server errs or is delayed, then service has not been completed. And, more important, if the statute of limitations has expired in the interim, then according to the theory accepted by the court below, the complaint must be dismissed as untimely. *E.g., Hoffman v. United Markets*, 117 LRRM 3229, 3231 (N.D. Cal. 1984); *Sieg v. Karnes*, 693 F.2d 803 (8th Cir. 1982).

In these circumstances, adoption of a rule requiring service within six months would have the effect of substantially shortening the time period within which DFR complaints must be filed. *Macon v. ITT Continental Baking Co.*, 779 F.2d 1166, 1171 (6th Cir. 1985). *See also Simon v. Kroger Co.*, 105 S. Ct.

[8] Although Rule 5(b) provides that service of most documents is effective upon mailing, Rule 5 does not apply to service of the summons and complaint. 4 Wright & Miller, *Federal Practice & Procedure: Civil* § 1141, at 569 (1969).

2155, 2156 (1985) (three Justices dissenting from denial of certiorari). Thus, a plaintiff who files a complaint against in-state defendants two or three weeks before the expiration of the statute of limitations may be too late in many cases, given the vagaries of completing service. And where a defendant is located in another state, or on the other side of the country (which is not infrequent where an international union is a DFR defendant), it would be necessary to file more than a month in advance to avoid the expiration of the six-month period.

Furthermore, defendants in DFR cases would have every incentive to refuse or evade service, or to quibble over the propriety of the form of service, despite having received actual notice of the proceeding, inasmuch as they might be able to defeat the action altogether, instead of simply delaying its prosecution, if they could only avoid having received the proper papers, in the proper manner, by the proper agent, in the proper time. *See Thomsen v. UPS*, 792 F.2d 115, 116 n.2 (8th Cir. 1986). Requiring service within six months would thus have the effect of encouraging litigants to battle over service issues, despite the plain intention of the Federal Rules to discourage such quarreling. In this regard, we note that because unions are unincorporated associations and generally do not have registered agents for the receipt of process, the plaintiff must track down the appropriate union officer, with the statute of limitations hanging in the balance, and attempt to serve him or her properly.

Moreover, even the simplified service procedures of Rule 4(c)(2)(C)(ii) would be virtually useless in DFR cases unless the complaint were filed several weeks before the limitations period expired. Thus, the defendant who receives the acknowledgement form has twenty days to send a reply. If expiration of the statute of limitations were imminent, the defendant would have every reason to ignore the notice and acknowledgement, in the hope that the plaintiff would not succeed in securing both reissuance of the summons and proper service within the required time. *See Sieg v. Karnes, supra. But see Morse v. Elmira Country Club*, 752 F.2d 35 (2d Cir. 1984) (state statute of limitations satisfied by unacknowledged receipt of process).

However, as the Court expressly recognized in *DelCostello*, 462 U.S. at 166, a limitation period that gave employees significantly less time than six months to initiate their DFR claims would likely prevent many such employees from invoking the protection of the DFR, which is a "bulwark to prevent arbitrary union conduct." *Vaca v. Sipes, supra*, 386 U.S. at 182. Thus, the very considerations that led this Court in *DelCostello* to adopt the limitations period in section 10(b), instead of a shorter state limitation period, lead to the conclusion that borrowing the service requirement in section 10(b) would seriously harm the policies underlying both *DelCostello* and the DFR in a way that borrowing the six-month limitation period would not.

Borrowing the service requirement could also have the effect of making the suit against the union untimely, while the suit could proceed against the employer, or *vice versa*. The reason for this difference is that, especially where different methods of service are used for each defendant, or where the defendants are located in different parts of the country, service will be effected on different defendants on different days. Thus, although the complaint against all defendants may have been filed in a timely fashion, some defendants may be served within the limitation period and some after it has expired. For example, in *Thomsen v. UPS, supra*, the company was served within the six-month period, but the union was served after it expired; hence the union is the only petitioner in this Court. *Teamsters Local 710 v. Thomsen*, No. 86-340. Yet in *DelCostello* the Court chose to apply section 10(b)'s limitation period for the very reason that applying state laws could lead to different limitations periods for the employer and union halves of the hybrid DFR action. 462 U.S. at 168 n.17, 169 n.19. Applying section 10(b)'s service rule would thus have the very effect which adoption of its limitation period was designed to avoid.

These harmful effects on the policies underlying *DelCostello* and the DFR might be reduced if, in addition to borrowing the Board's requirement of service within six months, the courts also borrowed the Board's service procedures. For example, in order to initiate a proceeding before the NLRB, the requirement

in section 10(b) that the charge be served within six months is satisfied simply by sending it by certified mail to the respondent, and service is complete upon mailing. *NLRB v. Laborers Local 264, supra*. Moreover, the statute does not require that service be accomplished by the charging party, and the Board's regulations direct the Board's Regional Director, with whom the charge is filed, to serve the charge on the person against whom it is made. 29 C.F.R. § 102.14. Thus, although the regulation provides that the charging party is "responsible" for effectuating service, as a practical matter it is normally the Regional Director who handles this. The regulations also allow the party himself to serve the charge by registered or certified mail, 29 C.F.R. § 102.112, or to have any other person accomplish service by personal delivery, registered or certified mail or telegraph, or by leaving a copy at the respondent's principal office or place of business. 29 C.F.R. § 102.111(a). The court of appeals did not suggest that service in this fashion would have made the complaint timely here, but the logic of its ruling—that the federal courts should attempt to replicate the balance of interests in section 10(b)—surely suggests that conclusion.

But adopting NLRB service procedures for hybrid actions would have its own very substantial disadvantages. First, it would require the district courts, which almost never decide NLRA cases, to construe Board regulations and decide issues of Board law in order to determine the adequacy of service. In addition, it would introduce new types of federal court service procedures for DFR cases only, contrary to the provisions of Rule 4, and thus would eliminate the advantages of uniformity in federal civil practice which was one of the principal objectives in adopting the Federal Rules of Civil Procedure. And finally, although the Board now requires certified mail, it might conclude at some future date that first-class mail would be adequate notice, *see Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), and the courts would then be required to accept such service also.

Moreover, if the union's argument for applying the service provisions of section 10(b) were correct, presumably it would also be necessary for the federal courts to borrow the Board's other rules for applying the six-month statute of limitations, such as when a claim accrues and the statute starts to run, or when a new claim relates back to the claims specified in the original charge, thus giving the district courts yet another task of construing and applying Board law. Moreover, Board law on the relation-back question has developed in a significantly different direction than the law in the federal courts. For example, even though a charge may have been filed about the unlawful treatment of only one employee, the Board will allow prosecution of an unfair labor practice complaint about similar treatment of other employees at about the same time, although a charge about them was not filed within the six-month limitations period. *E.g., Radio Officers Union v. NLRB*, 347 U.S. 17, 34 n.30 (1954), *enf'g Gaynor News Co.*, 93 NLRB 299, 307-309 (1951) (charge by one employee properly amended to allege same violation against all other non-union employees); *NLRB v. Braswell Motor Freight Lines.* 486 F.2d 743 (7th Cir. 1973); *Algreco Sportswear Co.*, 271 NLRB 499, 514-515 (1984). The reason for this rule is that the purpose of the charge is simply to initiate the Board's investigation, "not to give notice to the respondent of the exact nature of the charges against him." *Texas Industries v. NLRB,* 336 F.2d 128, 132 (5th Cir. 1964); *Pankratz Forest Industries,* 269 NLRB 33, 37 (1984). This approach is, of course, completely inconsistent with Rule 15(c), which allows an amended complaint to relate back only if the defendant had notice of the claims of the new party. *See* 6 Wright & Miller, *Federal Practice & Procedure: Civil* § 1501, at 523-524 (1971) (standards of Rule 15(c) apply to added plaintiffs as well as added defendants); *American Pipe & Constr. Co.*, 414 U.S. 538 (1974) (assumes that unless suit was brought as class action, statute of limitations would run on claims of persons similarly situated); *Schiavone v. Fortune*, 106 S. Ct. 2379 (1986).

The federal courts and the Board have also developed different rules for accrual and tolling of the statute of limitations.

For example, the federal courts hold that the running of the statute of limitations in DFR cases is tolled while an employee is exhausting administrative remedies under the contract or the union constitution. *Frandsen v. BRAC*, 782 F.2d 674 (7th Cir. 1986). By contrast, the Board, which does not recognize exhaustion defenses to unfair labor practice charges, disregards the fact that an employee may be exhausting administrative remedies in deciding statute of limitations questions. *Postal Service*, 271 NLRB 397, 400 (1984).

For all of these reasons, it is one thing to borrow a Congressionally created six-month period, but it is quite another to allow a federal administrative agency to dictate the method by which service is to be completed in federal court DFR actions, not to speak of overriding the provisions of Federal Rules 4, 8 and 15(c). Perhaps the borrowing of Board rules would be bearable if there were no other alternative, but that is plainly not the case here, because Rule 3 provides a ready, workable means of determining when the statute of limitations is satisfied. In short, it would be highly undesirable to plunge the district courts into the details of NLRB practice by adopting section 10(b) lock, stock and barrel, including its service requirements and procedures, solely in order to avoid the problems created by adopting section 10(b)'s requirement of service within six months. The best solution, we submit, is to hold that the statute of limitations is satisfied by the filing of the complaint, just as it is in all other federal question cases.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted,

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REGULATIONS INVOLVED (29 C.F.R.)

§ 102.14 Service of Charge.

Upon the filing of a charge, the charging party shall be responsible for the timely and proper service of a copy thereof upon the person against whom such charge is made. The regional director will, as a matter of course, cause a copy of such charge to be served upon the person against whom the charge is made, but he shall not be deemed to assume responsibility for such service.

§ 102.111 Service of process and papers; proof of service.

(a) Charges, complaints and accompanying notices of hearing, final orders, administrative law judges' decisions, and subpenas of the Board, its member, agent, or agency, may be served personally or by registered or certified mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same, setting forth the manner of such service, shall be proof of the same, and the return post office receipt or telegraph receipt therefore when registered or certified and mailed or when telegraphed as aforesaid shall be proof of service of the same.

(b) Whenever these rules require or permit the service of pleadings or other papers upon a party, a copy shall also be served on any attorney or other representative of the party who has entered a written appearance in the proceeding on behalf of the party. If a party is represented by more than one attorney or representative, service upon any one of such persons in addition to the party shall satisfy this requirement.

(c) Process and papers of the Board, other than those specifically named in paragraph (a) of this section, may be forwarded by certified mail. The return post office receipt therefore shall be proof of service of the same.

§ 102.112 Same; by parties; proof of service.

Service of papers by a party on other parties shall be made by registered mail, or by certified mail, or in any manner provided for the service of papers in a civil action by the law of the State in which the hearing is pending. Except for charges, petitions, exceptions, briefs, and other papers for which a time for both filing and response has been otherwise established, service on all parties shall be made in the same manner as that utilized in filing the paper with the Board, or in a more expeditious manner; however, when filing with the Board is accomplished by personal service the other parties shall be promptly notified of such action by telephone, followed by service of a copy by mail or telegraph.

When service is made by registered mail, or by certified mail, the return post office receipt shall be proof of service. When service is made in any manner provided by the law of a State, proof of service shall be made in accordance with such law. Failure to comply with the requirements of this section relating to timeliness of service on other parties shall be a basis for either (a) a rejection of the document or (b) withholding or reconsidering any ruling on the subject matter raised by the document until after service has been made and the served party has had reasonable opportunity to respond.

§ 102.113 Date of service; filing of proof of service.

(a) The date of service shall be the day when the matter served is deposited in the United States mail or is delivered in person, as the case may be. In computing the time from such date, the provisions of § 102.114 apply.

(b) The person or party serving the papers or process on other parties in conformance with § 102.111 and § 102.112 shall submit a written statement of service thereof to the Board stating the names of the parties served and the date and manner

of service. Proof of service as defined in § 102.112 shall be required by the Board only if subsequent to the receipt of the statement of service a question is raised with respect to proper service. Failure to make proof of service does not affect the validity of the service.

FORM EXEMPT UNDER 44 U.S.C. 3512

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

INSTRUCTIONS: File an original and 3 copies of this charge and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No.

Date Filed

1. LABOR ORGANIZATION OR ITS AGENTS AGAINST WHICH CHARGE IS BROUGHT

a. Name	b. Union Representative to Contact	c. Phone No.

d. Address (Street, city, State and ZIP code)

e. The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of section 8(b), subsection(s) _____ (List Subsections) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

3. Name of Employer	4. Phone No.
5. Location of Plant Involved (Street, city, State and ZIP code)	6. Employer Representative to Contact

7. Type of Establishment (Factory, mine, wholesaler, etc.)	8. Identify Principal Product or Service	9. No. of Workers Employed

10. Full Name of Party Filing Charge

11. Address of Party Filing Charge (Street, city, State and ZIP code)	12. Telephone No.

13. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By _____ (Signature of representative or person making charge) _____ (Title or office, if any)

Address _____ _____ (Telephone number) _____ (Date)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)